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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

**Implementation of the
Pay Telephone Reclassification
and Compensation Provisions of the
Telecommunications Act of 1996**

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CC Docket No. 96-128

To: The Commission

**COMMENT ON REMAND
OF AIRTOUCH PAGING**

AirTouch Paging ("AirTouch"), by its attorneys and pursuant to the Public Notice released August 5, 1997 (the "Remand Notice")^{1/}, hereby comments on the issues arising out of the Court-ordered remand of the captioned proceeding^{2/}.

The following is respectfully shown:

I. Preliminary Statement

1. AirTouch Paging is one of the largest providers of narrowband messaging and paging services in the United States. Many of AirTouch's customers opt for toll-free 800 or 888 numbers so that persons seeking to reach them will not incur long distance charges. Consequently, AirTouch and its subscribers have a tangible interest in the outcome of this proceeding which will determine the manner

^{1/} DA 97-1673 entitled "Pleading Cycle Established for Comment on Remand Issues in the Payphone Proceeding".

^{2/} See Report and Order, 11 FCC Rcd 20545 (1996) (the "Payphone Order"), recon. granted in part, 11 FCC Rcd 21233 (1996) (the "Order on Reconsideration"); vacated in part and remanded, Illinois Public Telecommunications Ass'n v. FCC, D.C. Circuit Nos. 96-1394 et al. (July 1, 1997) (the "Remand Order").

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and extent of compensation to payphone service providers ("PSPs") for 800 calls^{3/} placed to its customers.^{4/}

2. Before addressing the relatively narrow issues on which the Commission seeks further comment in the Remand Notice, AirTouch strongly urges the Commission to broaden the scope of the remand and revisit the issue of who should pay for payphone originated calls. As AirTouch and others argued in the past^{5/}, the total rejection by the Commission of a "caller pays" approach to compensating PSPs for 800 calls (other than access code calls) will seriously inhibit the development of a robust, competitively-priced payphone market, and/or skew the competitive market for these services. If the calling party who makes the decision to use a payphone to place an 800 call is obligated to pay, he or she will have an incentive to select a lower-priced alternative, thereby fostering robust price competition in the payphone services.^{6/} In stark contrast, a system in which the

^{3/} The term "800 calls" includes 800, 888 and all additional toll-free 800 number calls.

^{4/} AirTouch's interest in the proceeding is further confirmed by its role as a commenter in all prior phases of the payphone proceeding before the Commission, and by its active participation in the appeals of the Payphone Order and the Order on Reconsideration by the Personal Communications Industry Association ("PCIA"), of which AirTouch is a member.

^{5/} See, e.g., Petition for Partial Reconsideration of AirTouch Paging filed October 21, 1996 in CC Docket No. 96-128 at Sections II and IIIA.

^{6/} The current payphone compensation scheme has a captive party, the 800 customer, paying for all payphone calls irrespective of how much the payphone provider charges. Although the Commission suggests that an 800 customer can block 800 calls from payphones, suitable blocking options do not exist. See discussion, infra at Section V.

interexchange carrier ("IXC") pays the PSP, and passes the charge along to the called party, removes all competitive market forces at the payphone itself.^{7/}

3. The Remand Notice indicates that the Commission has chosen to construe the Court's Remand Order narrowly. This approach ignores the seriousness of the deficiencies found by the Court in the adopted scheme.^{8/} The better course would be for the Commission to recognize that the Court's decision calls the Commission's overall approach into question, and to seize upon the remand as an opportunity to revise its approach to payphone compensation free from the deadlines that dictated the timetable on the prior Commission orders.^{9/} Indeed, AirTouch and others became very concerned during the reconsideration phase of this proceeding that the Commission staff did not have adequate time, due to the statutorily-imposed time constraints, to give the Commission's usual careful and thoughtful consideration to the many serious issues that were raised on reconsideration. This concern is ratified by

^{7/} As AirTouch and others pointed out in earlier comments, because of the time allowed for PSPs and IXCs to charge for these services, paging providers and resellers of IXC services may not receive bills for these calls in sufficient time to pass charges through to their customers.

^{8/} The Court concluded that "the Commission acted arbitrarily and capriciously in selecting the interim and permanent rates of compensation for access code and subscriber 800 calls; in requiring only large IXCs to pay PSPs for these calls during the first year; in failing to provide any interim compensation to PSPs for so-called "0+" calls and calls from inmate payphones; and in prescribing fair market value for payphone assets transferred from a BOC to a separate affiliate." Remand Order, p. 4. In view of this multifaceted reversal, it is unsettling for the Commission to take refuge in the fact that "the court actually vacated only one narrow aspect of those orders". Remand Notice, p. 1.

^{9/} The Telecommunications Act of 1996 placed the agency under severe time constraints to release the Payphone Order and the Order on Reconsideration. See Communications Act, Section 276(b)1.

the extent to which the Court found the Commission's actions in the payphone proceeding to have been arbitrary and capricious.

4. There is no statutory deadline for the Commission to release an order on remand. While AirTouch urges the Commission to act quickly to resolve these issues promptly in deference to the Congressional objective of providing near-term compensation to PSPs, the Commission should nonetheless take the time to craft a better payment mechanism that will indeed foster price competition in the payphone market. A modified caller pays system deserves serious consideration.^{10/}

II. The Commission Should Discontinue Interim Compensation for Subscriber 800 Calls During the Remand

5. In its remand order, the Court concluded that the Commission "must now set a new interim rate and decide what is to happen once the interim period is over."^{11/} Rather than setting a new interim rate as ordered, the

^{10/} One approach which AirTouch Paging is studying is the possibility of establishing a unique 8XX code (e.g. 877) which would be toll-free in terms of long distance charges, but could be accessed from a payphone only if the person initiating the call puts coins (either the local call rate or a lesser 800 call charge amount) in the payphone. Presumably, long distance carriers would not establish access codes within this 8XX code, thereby eliminating the problem that the Telephone Consumer Services Improvement Act ("TOSCA") has been construed by some to prohibit PSPs from requiring callers to insert coins in payphones to access providers of operator services other than the pre-subscribed OSP. The existence of such a unique 8XX code would enable a paging operator to give the paging customer several options with respect to toll free calls from payphones. The customer could (i) choose an 800 or 888 number and pay any applicable per call payphone surcharges that were passed through (ii) choose an 800 or 888 number and avoid surcharges by blocking calls from payphones or (iii) choose a number within the unique 8XX code which would allow the customer to receive calls without a payphone surcharge provided that the caller put the applicable PSP 800-call compensation rate in the coin box.

^{11/} Remand Order, p. 17 (emphasis added).

Commission has opted to keep the old interim rate in place pending further action by the Commission on remand.^{12/}

6. The decision to continue to charge the discredited interim rate cannot be justified and should be reversed. The Court specifically found the Commission's interim plan to be arbitrary and capricious. Not only was the level of the interim rate found to be unjustified, but the payment mechanism was found to be unfair. Continuing this flawed scheme will only exacerbate the harm suffered by those who are forced to bear the burden of the unjust charges.^{13/}

III. Retroactive Adjustments Cannot Cure The Flawed Scheme

7. The Remand Notice purports to "place the industry on notice" that payments made or received under the interim plan may be subject to "retroactive adjustment" should the equities so dictate.^{14/} The problem, of course, is that the "IXC pays" system adopted by the Commission has trickle down effects on 800 number subscribers that will be difficult to reconstruct, and impossible to retroactively adjust. For example, recent published reports indicate that many IXCs have opted to recover costs associated with payments to PSPs through a general rate increase to 800

^{12/} See Remand Notice, pp. 1-2. This determination was made without any explanation by the Commission.

^{13/} This determination also flies in the face of competitive neutrality. The Commission has yet to set any interim rate for terminating compensation for messaging providers yet is establishing an interim plan that will result in messaging providers contributing to pay PSPs. The Commission should avoid inconsistent treatment such as this and refrain from imposing any interim payphone compensation scheme.

^{14/} Remand Notice, p. 2.

number subscribers.^{15/} Determining the amount of this rate increase attributable to payphone compensation would be problematic, and a rollback could be difficult to administer.^{16/}

8. Rebates also are complicated by the subscriber turnover that occurs in a competitive market. If (i) an IXC passes through an interim payphone charge to a paging company which (ii) then passes it through to a paging subscriber who (iii) discontinues service before any further action is taken by the Commission on remand, the ultimate subscriber may never receive the benefit of any rate rollback. It will prove to be totally impracticable to "unscramble the egg" in situations such as these. These complications compel the conclusion that payphone compensation obligations should be suspended until the Commission can establish a payphone compensation scheme that comports with the record and meets the Court's Remand Order.

9. The Commission is wrong to suggest that the Court would find it to be arbitrary and contrary to Section 276 of the Communications Act to fail to provide for interim compensation for subscriber 800 calls.^{17/} The Court's

^{15/} IXCs have started taking actions to recover the increased costs imposed on them by the payphone order costs. For example, MCI has raised its rates by more than 6% and Sprint has raised its rates by 7%. See '800' Data Toll Hike Hits Users, Communications Week, August 18, 1997. In addition, AirTouch has received notice that World Com Plans to start assessing a pass through charge in the Fourth Quarter of 1997.

^{16/} AirTouch understands that some new start-up PSPs may have entered the market just to capitalize on the interim compensation made available under the Commission's payphone order. These PSPs may disappear in short order and not be available to refund monies if there is a true up down the road.

^{17/} Remand Notice, p. 2, n. 3.

disapproval of the Commission's failure to establish an interim rate for compensation of 0+ calls is easily explained as a negative reaction to the inconsistent treatment accorded by the Commission to such calls in comparison to subscriber 800 calls that were to be compensated on an interim basis. This discrimination can be cured by cancelling the interim rate for subscriber 800 calls pending action on remand. A well-considered compensation plan can then be implemented for both subscriber 800 and 0+ calls in a common time frame.

IV. Adjustments Should Return Parties to Their Pre-Payphone Order Status

10. The Remand Notice seeks comment on the time period that should be covered by any adjustments required pursuant to an order on remand.^{18/} If the Commission accepts AirTouch's recommendation to abandon the interim compensation plan, then the scope of the necessary adjustments will be minimized.^{19/} There will remain, however, some need for reimbursement of any charges imposed under the now-discredited compensation scheme.

11. AirTouch recommends that adjustments be made to return all affected parties to the position they were in prior to the adoption of the Payphone Order, and that the effective date of any newly-adopted compensation obligations be deemed the effective date of the Commission's forthcoming order on remand from the Court. This position is supported by the fact that the Court found the Commission's

^{18/} Remand Notice, p. 5.

^{19/} The Commission asks the commenters to advise under what authority retroactive adjustments can be made. Remand Notice, p. 4. This question suggests some uncertainty on the Commission's part regarding its lawful ability to order retroactive adjustments of this nature. This uncertainty provides additional justification for abandoning the interim rates pending further action.

scheme to be flawed in multiple respects. The public interest will best be served by having the Commission write on a "clean slate" by returning parties to the status quo ante.

V. Other Aspects of the Payphone Order Require Further Study

12. Many paging industry participants in the payphone proceeding expressed concern that passing through to paging customers a per call surcharge of \$.35 presented a major problem because the customer would have no control over the charges that might accrue, thereby altering the fundamental character of the paging service as a low-cost, fixed-price communications alternative. The Commission responded to these concerns by promising that paging subscribers would have the option of blocking 800 calls from payphones to their units, thereby avoiding the surcharge.^{20/} In fact, the call blocking potential became a cornerstone in both the Commission's decisions and the Court's decision as it was perceived as a meaningful competitive check on the imposition of excessive charges for 800 calls by PSPs.^{21/}

13. In the period of time since the Payphone Order and the Order on Reconsideration were adopted, AirTouch has determined that there are severe limitations on the ability to block 800 calls to pagers from payphones that were not adequately considered by the Commission. In reality, effective, targeted call blocking options do not exist. Based upon its operating experience and consultations with IXC's and other industry representatives, AirTouch understands that there is no existing set of identifiers in the telephone ANI, that precisely signals "this is a

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^{21/} See, e.g., Order on Reconsideration, p. 11, Remand Order, p. 15.

payphone." Some coding digits within the ANI, serve to identify phones that cannot accept collect charges. However, this category includes not only payphones, but also some hotel phones, prison phones and other restricted phones (e.g. hospitals, businesses, etc.). Consequently, an order to block all calls with this ANI identifier would be overly broad and deprive the paging customer of the ability to receive calls from some locations to which no \$.35 payphone compensation charge would apply. Other ANI coding digits serve to identify LEC-owned payphones. An order to block calls from these phones would fail to screen surcharge calls from independently-owned payphones which are intended to become an ever-increasing percentage of the market. Thus, there is no sufficient method for a paging end user to use the coding digits within the ANI to block only calls from payphones that could give rise to a payphone 800 call surcharge.

14. Nor is there an effective means to selectively block calls from only those PSPs that are seeking to impose unreasonably high per call charges for subscriber 800 calls. Based upon discussion with IXC's, AirTouch understands that there is no available database or database dipping system that would allow a paging company to selectively block calls from overpriced payphones on a real time basis. And, the cost of establishing and maintaining such a system in the future could be prohibitive.

15. Because of the serious discrepancy which exists between the real world availability of effective blocking techniques and the call blocking rhetoric in the Commission's orders, the Commission should solicit further information from all interested parties and develop a full record on the current state of payphone call-blocking potential and the costs associated with implementing a properly targeted

blocking system. Unless and until an effective call-blocking option is in place upon which paging carriers can rely, they should not be subject to pass through charges associated with payphone compensation.

CONCLUSION

The foregoing premises having been duly considered, AirTouch Paging respectfully requests that the Commission issue an order on remand consistent with these comments.

Respectfully submitted,

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